

No. H039439

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

CARLA ISON, PH.D.,

*Plaintiff-Appellant,
In Propria Persona*

v.

GOOGLE, INC., YAHOO! INC., AND DOES 1-98

Defendant-Respondents

On Appeal from the Superior Court of the State of California, County of Santa Clara

Case No. 1-10-CV-163032

The Honorable Judge Kevin E. McKenney

The Honorable Judge James L. Stoelker

The Honorable Judge William J. Monahan

PLAINTIFF-APPELLANT'S OPENING BRIEF

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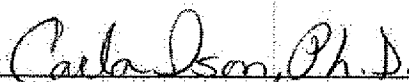
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CERTIFICATE OF INTERESTED ENTITIES OR PARTIES

(Cal. Rules of Court, rule 8.208)

Appellant knows of no entity or person that must be listed under subsections (1) or (2) of Rule 8.208. (Cal. Rules of Court, rule 8.208(d)(3)).

Dated: January 6, 2014



Carla Ison, Ph.D.

Plaintiff—*In Propria Persona*

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I. INTRODUCTION

The trial court ruling in this case, if left undisturbed, threatens to undermine the language and intent of California Business and Professions Code §14205(e)(3), which considers five years of continuous use in commerce evidence as a matter of law of secondary meaning in a professional, personal name, and deprive Plaintiff-Appellant [hereafter "Appellant"] Carla Ison, Ph.D., of the well-established legal right to amend her complaint liberally to add related causes of action as the facts warrant. The ruling would also, absurdly, allow Defendant-Respondents [hereafter "Respondents"] Google, Inc. and Yahoo! Inc. to sabotage the efforts of professionals throughout the state to establish trade names for their businesses, since many professionals utilize their personal names in a professional context, and rules of professional conduct frequently make it difficult to practice under so-called "fanciful" trade names. The court ignored well-established and commonly understood principles of the "relation back" doctrine, even though the additional causes of action arise easily out of the previous allegations. Finally, the court asserted incorrectly that all causes of action in the Fourth Amended Complaint ("4AC") necessarily must be dismissed should the Appellant fail to establish secondary meaning in her professional name. (CT vol. 17, pp. 4093-4172, 4AC; vol. 30, p. 7607, Order.)

This appeal arises out of a longstanding dispute between Appellant and Respondents over her attempts to market her psychology practice over the Internet. (CT

vol. 17, pp. 4093-4172, 4AC; vol. 30, p. 7607, Order.) Appellant went to great lengths to try to work through the Respondents' customer service departments, ultimately to no avail (CT vol.17, 4103, line 11-4105, line 25, 4AC).

Three main issues undergird this appeal:

- 1) Did the lower Court wrongfully deny Appellant Carla Ison, Ph.D. (hereafter "Appellant"), her day in court by denying of her Motion for Leave to further amend her Complaint?
- 2) Did the lower Court wrongfully deny Appellant her day in court by granting summary judgment to both Respondents?
- 3) Finally, did the lower Court inappropriately restrict discovery by Appellant?

The answer to each question is yes, although there does not appear to be any California case directly on point under Bus.Prof.Code 14205(e)(3).

Respondents are both giants in the Internet browsing market, each operating programs in which businesses pay to advertise services and/or goods on the Internet. Google's online advertising program is known as "Adwords." Yahoo! operates a similar program which is currently called "Yahoo! Search Marketing" (they have offered the same or similar programs under different names in the past). In these programs, advertisers pay the Respondents each time one of the advertisers' ads is "clicked," i.e. electronically selected, by a person or a software program.

In addition, Respondents operate programs in which website owners can earn money by allowing the Respondent to place advertisements produced by the Respondent's advertising customers on the website owners' websites. Google's ad hosting program, open to all website owners, is called AdSense; Yahoo's program,

offered in partnership with Microsoft, Inc., under the name Bing Yahoo! Search Network or Bing Ads, is restricted to a selected number of websites under contract with Yahoo! and/or Microsoft. Yahoo's earlier ad hosting program, which was offered between 2005 and April, 2010--the relevant period in this case in regard to Yahoo's misuse of Appellant's identity--was called "Yahoo! Publisher Network." Like Google's AdSense program, Yahoo! Publisher Network was open to all website owners on the Internet.

Appellant contracted with Respondent Google to procure Internet advertising services via AdWords and with Respondent Yahoo! to host her website, www.carlaisonphd.com.

Both Respondents recruit new advertising and website hosting customers with promises of enhanced visibility on the Internet and, as a result of this visibility, increased business; however, neither Respondent warns their clients, before or after the clients enroll in the Respondents' advertising and/or website hosting programs, that by enrolling in these programs, the clients' professional business names and identities may be sold for use as a "keywords" to direct Internet traffic to Internet-based advertising and other online content that is unrelated to the clients' businesses, that the Respondents might actually *suggest* their professional names be used as keywords by third parties, and that third-party websites to which the clients' business names and identities are being used to drive traffic may not contain any information about the clients. Respondents also do not warn their advertising and website hosting clients that, by

enrolling in the Respondents' programs, the clients' business names and identities may become linked with undesirable content, such as pornography, on the Internet for an indefinite amount of time—in some cases for years. Respondents further fail to warn their clients that the dissemination of the clients' business names and identities through the Respondents' technology, which both enables consumers' searches of the Internet and inserts clients' business names in the results of such searches, will itself create a feedback loop in which the clients' business names and identities become more desirable for purchase by third parties as keywords in Respondents' advertising programs.

The most sought after feature of both Respondents' advertising programs is the ability to purchase keywords in order to drive Internet traffic to websites. While not objectionable in the abstract, when the keywords consist of the identity of a person or their business, whether there are trademark violations or not, the use of that identity to promote third-party products and services not only suggests to consumers endorsement or sponsorship of those third-party products or services by the person or business whose identity is being used, but does so without permission from, or compensation to, the owner of that identity. No one would question the illegality of a television commercial that asserted that Dr. X advises you buy product Y, without Dr. X's knowledge, permission and compensation. Yet this is essentially what has been occurring when third parties purchase Appellant's professional name as a keyword from Respondents in order to direct traffic to those third parties' products and services. AdWords potentially

even lures unsuspecting third parties into unlawfully activity by suggesting as keywords others' names and identities.

Not only do Respondents fail to warn advertising clients of the downside of participating in Respondents' advertising campaigns and website hosting programs, but Respondents intentionally present confusing, often unintelligible explanations of their programs in thousands of pages of online documentation, making it impossible for even a reasonably intelligent business owner to fully navigate and understand in order to make an assessment of risks and benefits of these programs. Indeed, with exception to customer lists covered by a protective order, the entirety of written discovery provided by the Respondents consisted of thousands of pages of customer service information already available to the Appellant as an AdWords customer. Moreover, the Respondents have the means at their disposal to fully protect advertising and website hosting clients, such as Appellant, from the abuse of their identities—in fact, they are the *only* parties who have the means to fully protect their clients in the context of their programs--but they refuse to do so; nor do they inform prospective clients of that fact. The interests of justice require that this misconduct by Respondents be addressed. (CT vol. 17, p. 4105, lines 12-25, 4AC; vol. 29, pg.7254, lines 2-14, RSUF; vol. 29, pg.7327, lines 14-16, Mandel Decl.)

Appellant sought to obtain the assistance of legal counsel for more than two years after she began discovering the Respondents' violations in order to assist in defending her professional reputation, and wresting online control of it from Respondents.

Interviews of over 25 attorneys in the Bay Area revealed that most were not willing to oppose Respondents, fearing repercussions. It was not until the fall of 2009 that Appellant found an attorney, Mr. Burke Hansen, in San Francisco who was willing to assist her with the case. By the time Appellant located an intellectual property specialist willing to assist with the case, she had already amended her Complaint four times to clarify her claims against Respondents. Although the 4AC contained claims (and unpleaded potential claims) that were not rightfully limited by whether or not she possessed trademark rights in her professional name, the lower Court granted Respondents' motions for summary judgment in their entirety and denied her leave to amend, thereby dismissing the Appellant's entire case. CT vol. 29, pg.7252, lines 20-28, p. 7253, lines 1-8, Pl's Resp. to Google's Sep Stat; vol. 30, pp. 7607-7608, Order Re: Google's Mot for SJ.) Unfair competition, which has been claimed since the initial complaint, for example, covers any unlawful or unethical behavior in commerce.

While Appellant's recently hired intellectual property legal counsel was in the process of reviewing the history of the proceedings and the facts, as well as pouring through documents and responses to discovery that Respondents finally began producing in early summer of 2012, she was bombarded by demands by both Respondents on a daily basis. When, in the midst of all of these demands, Appellant's new counsel realized that testimony was needed from senior corporate representatives of both Respondents in order to understand facts relating to Appellant's claims, both Respondents engaged in unrelenting stonewalling, preventing Appellant from

meaningful discovery of corporate representatives, and, in self-serving fashion, interpreting discovery rulings as limiting Appellant to a narrow field of inquiry for any and all discovery requests (CT vol. 29, p.7327, lines 14-24, pg.7328, lines 3-25, Mandel Decl.). After Appellant obtained the Respondents' parsimonious discovery responses (parsimonious in their responsiveness, though certainly not in volume), and after consulting with her recently hired intellectual property specialist, Appellant realized that, regardless of whether Respondents had infringed her trademark rights, she also had related claims arising out of the originally pleaded facts as well as the newly obtained evidence. However, with the Respondents' motions for summary judgment misleadingly asserting to the lower Court that all of the claims of the 4AC arose solely out of the Appellant's disputed marks, Appellant sought to amend the claims to clarify which rested solely on her trademark claims and which did not. (CT vol. 15, pp. 3618-3867 and vol. 16, pp. 3868-3928, Yahoo's Mot. for SJ; vol.16, pp.3929 -4066 and vol. 17, pp. 4067-4323, Google's Mot for SJ.) Appellant diligently sought to amend the 4AC; her new limited scope counsel informed both Respondents via email dated September 4, 2012, that Appellant would be seeking leave to amend the Complaint. (CT vol. 19, pg.4820, lines 10-12, and pp.4838-39, Exh. C, Varas Decl.)

Luring solo practitioners such as Appellant into Respondents' advertising and website hosting programs in order to use their professional names and identities without their consent to generate additional business income constitutes misappropriation of identity and right to publicity. Respondents' actions have deprived Appellant of control

over how her professional name and identity are used online, invading her privacy, damaging her professional reputation, and costing her income. As absurd and as brazen as it appears, the Respondents, apparently with a straight face, convinced the lower Court at the time of the hearings on summary judgment and Appellant's Motion for leave to file a 5AC both that the Appellant did not have any trademark rights in a professional name she had by then used for close to eight years, and that they would be prejudiced by the addition of a similar new claim that hewed even more closely to their version of the facts.

Appellant's quest to obtain meaningful discovery supporting her initial causes of action was a David-versus-Goliath scenario in which the Respondents, corporate giants, fought her relentlessly every step of the way for over two years before producing any responsive discovery whatsoever. The Respondents metered out their responses to Appellant's discovery requests and only late in discovery produced modestly meaningful documents and discovery responses, and that only after the lower Court partially granted the Appellant's Motion to Compel. After spending literally years searching for intellectual property counsel willing to take on these two corporate behemoths in a case of first impression, in August, 2012, the Appellant secured the assistance of an intellectual property specialist, Ms. SaraLynn Mandel, who spent several weeks reviewing the case and the discovery produced. After discussions with the new and existing counsel, Appellant realized the extent of Respondents' wrongful conduct and that her Fourth Amended Complaint required yet further amendments and

the addition of causes of action to properly address Respondents' acts and her claims. These additional causes of action had been contemplated and discussed the Respondents earlier, but Appellant was in need of additional counsel to fully incorporate and present them to the Court. (CT p.4820, pp.10-12 Varas Decl.). Although delay has been the preferred tactic of the Respondents, the Appellant's reason for delay was to bring her new counsel up to speed.

Perhaps not surprisingly in light of the case history, the Respondents continued to stonewall the Appellant and her new counsel in their efforts to obtain further discovery, which was needed to demonstrate the exact nature and extent of misuse of Appellant's professional name and identity, and intrusion into Appellant's privacy rights. Indeed, Respondent Yahoo! refused to produce a single deponent as a "person most knowledgeable," ("PMK") in response to Appellant's repeated requests and Motion to Compel, obscuring its refusal in endless demands for meet and confers and narrowing the PMK inquiry to the point where the deposition would have yielded little in the nature of meaningful discovery on Appellant's claims. This was only the latest in a long history of discovery stonewalling by the Respondents. For example, Appellant did not receive verified responses to interrogatories and requested documents for nearly two years after first serving discovery on Respondent Google.

Like Yahoo!, Google was uncooperative in regard to PMK deponents, providing as a PMK deponent an employee who had worked at Google for only two years, who did not have a background in computer technology (the employee had worked at a radio

station prior to taking a job at Google), who demonstrated less knowledge than even Appellant had about Google's system, and who repeatedly sabotaged Appellant's counsel's attempts in the deposition to obtain answers to questions that could explain portions of Google's responses to Appellant's discovery requests.

Because of the Respondents' delaying tactics, the obstacles that Appellant faced in her over two-and-a-half-year search for qualified counsel, the exceedingly complex nature of the Respondents' technology underlying their online services (which required a significant amount of time to learn to sufficiently to determine how Respondents' had misused Appellant's business name and identity) and Respondents' unceasing stonewalling and delay in the discovery process, Appellant was not able to determine the amendments needed, including new causes of action, until November, 2012.

As a matter of law, the lower Court erred in denying Appellant's Motion for Leave to File her 5AC and in granting Respondents' motions for summary judgment, in view of the clear severe prejudice that would result and did result from denial of amendment, as well as the lack of evidence of surprise or other serious prejudice to Respondents. (CT vol. 30, pp. 7607-7608, Order Re: Pl's Mot for Lv; vol. 30, pp. 7609-7615, Orders Re: Defs Mots for SJ.) In view of the miscarriage of justice in denying Appellant her day in court, Appellant respectfully requests that this Court reverse the trial court's judgments and remand for further proceedings.

II. STATEMENT OF THE CASE

Appellant filed her initial Complaint on February 3, 2010, alleging counts relating to the misuse of her professional name by both Respondents. Appellant filed a First Amended Complaint on February 8, 2010. A Second Amended Complaint was filed on March 12, 2010. Respondents demurred to the Second Amended Complaint, which was sustained with leave to amend. A Third Amended Complaint was filed on July 19, 2010. Respondents again demurred, but Appellant was granted leave to amend on November 4, 2010. A 4AC with six causes of action was filed on December 13, 2010. (A copy of the 4AC can be found in CT vol. 17, pp. 4093-4174, of Evidence in Support of Google's Motion for Summary Judgment.) Respondents again demurred, but were overruled with the exception of claims of vicarious trademark infringement. Appellant represented herself *in propria persona* for the first through fourth iterations of the Complaint. Substantive discovery responses were not provided by Respondents until after resolution of cross motions for discovery, decided in June 8, 2012 (CT vol. 14, pp.3560-3565, Orders).

On November 19, 2012, Appellant filed a Motion for Leave to File a Fifth Amended Complaint with a Notice of Errata filed on November 20, 2012 (CT vol. 21, pp. 5171-5964, Mot for Lv and Ntc of Err). Appellant also represented herself *in propria persona* for the Motion for Leave to File the 5AC. Appellant had retained intellectual property legal counsel, Ms. SaraLynn Mandel, on a limited representation basis to assist Appellant prior to the filing of the motion.

Each Respondent filed a Motion for Summary Judgment or in the Alternative Summary Adjudication of all of Appellant's pending claims on September 14, 2012 (Respondent Yahoo!) and September 28, 2012 (Respondent Google) (CT vol. 15-16, pp.3837-3928, Yahoo's Mot for SJ; vol. 16, pp. 3939-4066, Google's Mot for SJ.) Appellant filed an Opposition to each Motion for Summary Judgment on December 24, 2012. (CT Vol. 28, pp. 7108-7156, Pl's Opp to Defs' Mots for SJ.)

Respondents filed Oppositions to Appellant's Motion for Leave to file the 5AC on November 30, 2012¹ (CT vol. 26, pp. 6683-6989 and 6994-7007, Defs' Opps to Mot for Lv). The trial Court heard both the Appellant's motion to file a 5AC and the motions of both Respondents for summary judgment on January 8, 2013. The motion to file a 5AC was denied by Order ("5AC Order") dated January 22, 2013, and filed on January 23, 2013. (CT vol. 30, pg 7607-7608, 5AC Order.) Both of Respondents' motions for Summary Judgment were granted by Order ("SJ Order") also dated January 22, 2013 and filed on January 23, 2013. (CT vol. 30, pp. 7609-7615, SJ Order).

In the Order denying Appellant's Motion for Leave to File 5AC ("5AC Order"), the Court asserted the motion was not "timely at this late stage of the litigation and especially in view of the pending trial date," even if a "brief continuance might have been granted." (CT vol. 30, p. 7607, lines 16-18, 5AC Order). The trial Court further stated that another basis for denial was that Respondents would be prejudiced because they "expended substantial expense and efforts in their defense," and would have to

¹ Defendant Google omitted its memorandum of Opposition in its service on Appellant on November 30, 2012, but provided it several days later on December 3, 2012.

“virtually re-litigate an essentially new case starting with demurrers, discovery, and motions for summary judgment, as well as re-prepare for trial.” (CT vol. 30, p. 7607, lines 21-24, 5AC Order). The Court also asserted there was “no legally supportable bases for the new causes of action. The statutes of limitation appear to have run.” (CT vol. 30, p. 7607, lines 25-26, 5AC Order.) The Court added that “Appellant’s counsel acknowledged, there is no federal or state statute that Appellant can cite to support her new causes of action².” (CT vol. 30, p. 7607, lines 25-28, 5AC Order). The Court concluded that “[A]lthough the procedural defects in this motion are not the only reason for denying this motion, in view of the history and the pending trial date, Appellant had the responsibility to explain exactly why this motion should be granted. This was not done.” (CT vol. 30, p. 7607, lines 1-3, 5AC Order).

In the Order granting both Respondents’ motions for SJ, the Court stated: “Despite Appellant’s arguments to the contrary in her oppositions and at the hearing on these motions, Defendants have established that all causes of action remaining in Appellant’s 4AC depend on the assertion that the “Ison Marks” are protected trademarks/trade names.” (CT vol. 30 p. 7610, Order). The Court continued: “Both of Appellant’s “Ison Marks” are descriptive terms and under both California and federal law Appellant has the burden of proving that they have acquired secondary meaning

² Attorney Barry Van Sickle erred in his presentation on Appellant’s behalf regarding statutory authority for Appellant’s claims at the hearing on summary judgment. He later admitted that he was not sufficiently familiar with the case, which was true. Appellant and her other counsel deny having ever represented to the Court lack of statutory authority for Appellant’s claims. The Court is directed the proposed 5AC re: statuory authority on the claims, but such authority is not required, as common law may support claims. (CT XX, Seventh Claim for relief (Cal.Civ.Code §1710); Sixth Claim Cal.Bus.Prof.Code §17200; Fifth Claim, Cal.Civ.Code §3344).

before they are protected as trademarks and/or trade names. The allegations of the 4AC itself, Appellant's discovery responses and deposition testimony (attached as exhibits to the declarations of Yahoo counsel Christopher Varas and Google counsel Michael Powell) and the market survey and declaration by Hal Poret (presented by Yahoo! but also relied on by Google) are sufficient to establish: 1) that all of Appellants remaining claims are based on and depend upon the allegation that her "Ison Marks" are protected trademarks/trade names; 2) that Appellant has no evidence either of her "Ison Marks," which are both plainly descriptive terms, have acquired any secondary meaning, and; 3) admissible evidence- the survey by Mr. Poret of the most relevant market area- establishes that the "Ison Marks" have not acquired secondary meaning in the minds of the public in that most relevant market area." (CT vol. 30, p. 7612, lines 22-28, and p. 7613, lines 1-7, SJ Order.)

However, Business and Professions Code § 14205(e)(3), read in conjunction with California Code of Civil Procedure § 473(c) and well-established case law, make clear that the trial Court improperly shifted the burden of proof to the Appellant to establish secondary meaning in her professional name, which, as we will see, when considered in the light most favorable to the Appellant, should already have been treated by the trial Court as established. The judgments in favor of the Respondents must be reversed.

III. STATEMENT OF APPEALABILITY

Appellant appeals the final judgments of Santa Clara County Superior Court entered on February 8, 2013 in Case No. 1-10-163032 in favor of Respondents pursuant to California Code of Civil Procedure § 904.1(a)(1).

IV. STATEMENT OF FACTS

The Appellant has common law rights to her professional name in California by virtue of the marks' eligibility for protection and the Appellant's status as the senior user of the marks, which she has used continuously and exclusively since 2004, when she opened her clinical psychology practice. The Appellant has done extensive searches and has not found anyone else who shares her name and also has a Ph.D. Her marks are unique and distinctive designations of the source of the Appellant's various psychological services. The Appellant has invested hundreds of thousands of dollars in her education and private practice, including continuing education for professional development and advertising and marketing in order to increase public awareness of her services. The Appellant has advertised through a variety of media, including on the Internet, in print and in telephone directories. The Appellant is well known within the geographic area of the San Francisco Bay Area where she works as a provider of high-quality psychological services. The Appellant has received calls from places as far away as Taiwan and Africa, so public awareness of the Appellant's work in the field of clinical psychology extends far beyond the boundaries of the immediate area in which the Appellant works.

Through the Appellant's actions, and because of favorable public acceptance and recognition, the Appellant's professional marks have become distinctive designations of the source of origin of the Appellant's services- there is no other Carla Ison, Ph.D.. As a solo practitioner, her trade name represents the Appellant, her services, and goodwill. Since she has been practicing continuously for over five years, the Appellant's professional name has developed secondary meaning amongst those searching for psychological services in the San Francisco Bay Area and Northern California. According to Sussex Publishers, LLC, who own and operate PsychologyToday.com, which is a website on which the Appellant has been advertising since 2004, over 100,500 searches have been conducted on the area (i.e. Mountain View and adjacent communities) webpages on which the Appellant has posted her advertisement over the past four and a half years—and this is on just one website.

In addition to having an online presence, the Appellant is also known in Bay Area medical, psychotherapeutic, and religious communities as a result of the clinical work and volunteer activities in which she has been involved. These activities have included the following: clinical work at Good Samaritan Hospital in Los Gatos, Santa Clara County Medical Center in San Jose, Kaiser Permanente in South San Francisco, the San Mateo County Medical and Mental Health Centers in San Mateo, and the Adult and Child Guidance Center in San Jose; presentations on various psychological topics at community centers in Mountain View and Palo Alto; attendance in continuing education courses held at various Bay Area venues, such as at Stanford University and the Palo

Alto and Menlo Park Veterans Administration facilities, and the C.G. Jung Institute in San Francisco; participation in events and programs offered by local professional and other organizations, such as the Santa Clara County Psychological Association and the Stanford-based branch of the San Francisco Psychoanalytic Institute and Society; attendance in grand rounds at Stanford University and El Camino Hospitals; participation in groups at local churches and work with a local Christian counseling center; and volunteer work at the Veterans Administration in Palo Alto, at the Stanford Advanced Medicine Center, Menlo Park Presbyterian Church, and Opportunities Industrialization Center West (now JobTrain) in Menlo Park.

Throughout the 25 years that Appellant has resided in the Bay Area, Appellant has established relationships with many members of the local community, particularly in Mountain View where she has her private practice. Although the Appellant did her best to utilize the advertising and web hosting services of the Respondents to grow her practice doing business with the Respondents became a nightmare, as her attempts at marketing her business through the Respondents' services led to her professional name being used across the Internet by various third parties to whom she had never given permission to do any such thing. At no time did she give the Respondents any permission, authority, or license to use or sell the right to use the Appellant's marks for the promotion of the goods and services of third parties, either directly or indirectly—particularly third parties who have nothing to do with the Appellant's practice, who compete with the Appellant, or who defame the Appellant's name and put her at risk of

potential professional misconduct, or at the very least force her to monitor the illicit use of her professional name on an almost constant basis.

Furthermore, Appellant had no idea that once she became involved with Respondents through their services, she would not be able to extricate herself from their fraudulent arrangement with unscrupulous third-party website owners, or that Respondents would be willing to spend millions of dollars to defend their "right" to not only keep the misuse of Appellant's name going, but also to prevent Appellant from even learning what the identities of the unscrupulous third parties were. Compounding the problem is the fact that, because the Respondents, particularly Google, provide the most widely used means of conducting Internet searches, Appellant is actually dependent upon Respondents for successful promotion of her private practice. For this reason, Court action to protect Appellant's right to practice without undue interference, including retaliation by Respondents, is critical.

The evidence clearly shows that Respondents have sold to third-party advertisers the "right" to use the Appellant's marks or terms confusingly similar thereto as part of the Respondents' search engine-based programs, regardless of who the third parties have been. The Respondents' programming utilizes the expressed interest of Internet users in the Appellant's professional name to trigger advertisements and other search results containing links to websites that are not the Appellant's website, or authorized by the Appellant to use the Appellant's trade name. In many cases, these websites are highly inappropriate. For example, the Appellant has frequently seen her marks

associated with advertisements for websites that offer prison records (CT vol. 17, p.4139, Exh.3, Evid in Supp of Google's Mot for SJ). For the court's information, the Appellant made inquiries with the local police and was told that no one with the Appellant's professional name has ever served time in prison or even had a police record. The Appellant never authorized the Respondents to sell or in any way offer the right to use the Appellant's marks in commerce to draw web users to these or other similar inappropriate websites. Nevertheless, these unauthorized search results appear in close and confusing proximity to legitimate search results containing links to the Appellant's website. Many of these unauthorized search results use the Appellant's marks in whole or in part within the title and text of the search results themselves.

Use of Appellant's marks as keyword triggers in third-party advertising programs and in search results that drive consumer traffic to third-party websites allow Respondents and their advertising and ad-hosting clients to benefit financially from, and trade off, the Appellant's goodwill and reputation without incurring the expense that the Appellant has incurred in building up name recognition. Through these practices, the Respondents traffic in the infringement and dilution of the Appellant's marks, and falsely represent or confusingly suggest to consumers a connection to the Appellant that does not exist. These practices cause consumer confusion, erode the distinctiveness of the Appellant's marks, and cause the Appellant to lose the control to which she is entitled over the commercial use of the Appellant's marks by placing such control in the hands of the Respondents and their advertisers, as well as other search engine operators

who use the Respondents' search engine technology. The Appellant included a small number of the infringing activities she had discovered as exhibits to her initial and subsequent Complaints.

As noted, *supra*, the Respondents' programming creates "Sponsored Links" and other search results that either use terms that are confusingly similar to the Appellant's marks or are formatted in ways that are likely to cause confusion with her trade name marks. It is indisputably the intent of Respondents' advertising programs to provide unprecedented exposure for the goods and services of advertising and website hosting customers, such as Plaintiff. Unfortunately, in addition, without adequately disclosing the risks, Respondents also use the names, trademarks and goods and services provided by customers, such as Plaintiff, who avail themselves of Respondents' programs and tools, to misdirect consumers to the websites and advertisements of individuals and entities not affiliated with, endorsed, sponsored, or approved or authorized by the Plaintiff and other customers. Moreover, some of these websites and advertisements with which customers are linked are scandalous or otherwise embarrassing, and, regardless of their content, most do not contain any reference even to the customers, or his/her/it's goods and services.

The Respondents have altered their Internet advertising program descriptions and instructions repeatedly, yet the descriptions and instructions remain confusing and insufficient to adequately warn their customers, such as Plaintiff, of these risks. Respondents do not provide any explicit warnings to their customers of risks associated

with using Respondents' services, in particular the risk of association of the customer's name and services with unrelated and undesirable content throughout the Internet. Because the nature of the indexes compiled by the Respondents utilize the number of linkages to a particular page to determine relevance, so-called "natural" search, the sponsored ads often contribute to an unhealthy feedback loop for customers such as the Appellant. For example, the Respondents have advertising programs, such as "AdSense" program, which make similar commercial use of the Appellant's marks or terms confusingly similar thereto in order to trigger advertisements on third parties' websites throughout the Internet. In at least some of these instances, the title and/or text of these advertisements also make use of the Appellant's marks or terms confusingly similar thereto, which confuses the public at large via misleading ads and misleading "natural" search.

In summary, the Respondents' trade name policies constitute, in practice, use in commerce of the registered and common law trade names of others', including common-law trade names, "Carla Ison, Ph.D." and "www.carlaisonphd.com," with full knowledge that consumers are likely to be confused and lured away from the websites that they intended to visit, and with the goal of financially benefiting the Respondents to the detriment of the Appellant and other trade name and service mark owners. Due to the discovery debacle detailed *supra*, it is still unclear to what extent the Respondents' keyword suggestion tool has played a role in the abuse of the Appellant's professional trade name.

Appellant sustained enormous personal and professional damages resulting from Respondents' misuse of her name and marks, and further from Respondents' failure to take reasonable steps to remove injurious, unauthorized uses of Appellants name and trademarks from the Respondents' advertising systems within a reasonable amount of time after Appellant notified Respondents of the problem. The harm to the Appellant has included not only loss of Appellant's ability to market her services to consumers but also loss of a significant number of patients and potential patients affiliated (whom Appellant has had to refer to other therapists in order to avoid potential conflicts of interest because of the patients' and potential patients' affiliation with Respondents); networking opportunities in the health care community; professional contacts and friends on account of their fear of retaliation by the Respondents; opportunities to contribute to journal and newspaper articles; an opportunity to create an Internet-based health care program; a company advisory board position; and educational opportunities to further her career for which Appellant had been preparing for decade prior to the lawsuit.

Over two and half years prior to the filing of this lawsuit Appellant expended considerable, repeated effort to contact the Respondents to request that they remove and prevent unauthorized uses of Appellants trademarks by third parties within Defendant's advertising systems. Even after this lawsuit was filed in February, 2010, the infringement of the Appellant's trademark by the Respondents' or their advertising partners continued. The Appellant has found evidence of abuse of her name and

trademark on Respondent Yahoo!'s website as recently as July 14, 2012, and on Google's website as recently as October 2, 2012. Appellant discontinued using Respondent Yahoo!'s web hosting services in 2012 and Respondent Google's advertising services in 2009. However, as noted *supra*, the infringing activity continued long after that.

The Respondents have been well aware of the risks of trademark infringement and harm from association of their advertising customers' names and marks with unapproved third party's products and services on the Internet, via their advertising programs, for years. Yet, in their terms of use contracts, they intentionally concealed material facts and intentionally disclosed only vague references regarding the potential of unauthorized and objectionable uses of her name and trademarks by third parties, as a result of her participation in their respective advertising and website hosting programs--references that in no way prepared the Appellant for the barrage of online associations of her name and trademarks with unrelated products and services.

Respondents knew, but intentionally did not adequately disclose in their contracts or their promotions describing their services, the degree of unassociated online content that was likely to arise as a direct result of Appellant's participation in their advertising and website hosting programs, or the fact that once the Appellant's information became ensnared in the Respondents' online schemes, there would be no way out. To make matters infinitely worse, Respondents either cannot or will not remedy the harm caused by their misuse of their advertising customer's names and trademarks. Obviously, the

Respondents' have sole control of their advertising systems and can reasonably be expected to be capable of monitoring and controlling every aspect of those systems to website as recently as July 14, 2012, and on Respondent Google's website as recently as September 3, 2012.

Plaintiff has lost and is continuing to lose the ability to attract those patients. By reason of the above, Defendants have violated the Plaintiff's exclusive rights in and to the use of the registered trademarks "Carla Ison, Ph.D.," "Carla C. Ison, Ph.D." and "www.carlaisonphd.com," and variations thereof, and have contributed to the violation of such rights by others by enabling, cooperating with, suggesting, and encouraging the use of Plaintiff's trademarks by others, and may be held liable in a civil action under the common law of the State of California and relevant provisions of the California Model Trademark Act, California Business Provisions Code § 14200 *et sequentes*.

A. APPELLANT'S FOURTH AMENDED COMPLAINT

Appellant's claims for relief in the 4AC were:

Count 1: First Claim for Relief for Common Law Trade Name/Service Mark Infringement;

Count 2: Second Claim for Relief for Contributory Trade Name/Service Mark Infringement under the Common Law;

Count 3: Third Claim for Relief for Vicarious Trade Name/Service Mark Infringement under the Common Law;

Count 4: Fourth Claim for Relief for Dilution under the Common Law;

Count 5: Fifth Claim for Relief for Misappropriation under California Law;

Count 6: Sixth Claim for Relief Money Had and Received; and

Count 7: Seventh Claim for Relief for Violation of California Business and Professions Code for Unfair Competition Under California Law.

(CT vol.17, p. 4093, 4AC).

B. APPELLANT'S PROPOSED FIFTH AMENDED COMPLAINT

The claims for relief in Appellant's proposed 5AC were:

Count 1: First Claim for Relief for Common Law Trade Name/Service Mark Infringement;

Count 2: Second Claim for Relief for Contributory Trade Name/Service Mark Infringement under the Common Law;

Count 3: Third Claim for Relief for Trademark Dilution under the Common Law;

Count 4: Fourth Claim for Relief for Commercial Misappropriation under California Common Law;

Count 5: Fifth Claim for Relief for Statutory Misappropriation Pursuant to Civil Code §3344;

Count 6: Sixth Claim for Relief for Unfair Trade Practices in Violation of California Business and Professions Code §17200;

Count 7: Seventh Claim for Relief for Fraudulent and Deceitful Concealment under California Civil Code §1710;

Count 8: Eighth Claim for Relief for Negligence, or in the Alternative Recklessness; and

Count 9: Ninth Claim for Relief for Negligent Interference with Prospective Economic Relations.

(CT vol. 21, pp. 5171-5669, 5AC).

The 5AC included the facts originally pled in support of the claims for relief in the 4AC and added facts obtained through discovery and research conducted since the 4AC was filed in 2010.

V. STANDARDS OF REVIEW

A. LEGAL STANDARDS FOR APPELLATE REVIEW OF DENIAL OF LEAVE TO AMEND A COMPLAINT

On appeal, denial of leave to amend is reviewed *de novo*, as to whether a cause of action was stated as a matter of law, and applying the abuse of discretion standard to review the trial court's denial of leave to amend. *Montclair Parkowners Assn. v. City of Montclair* (1999) 76 Cal.App.4th 784, 790.

In *Mesler v. Bragg Management Co.*, the California Supreme Court explained the role of an appellate court in reviewing a trial court's denial of leave to amend as follows: "When a request to amend has been denied, an appellate court is confronted by two conflicting policies. On the one hand, the trial court's discretion should not be disturbed unless it has been clearly abused; on the other, there is a strong policy in favor of liberal allowance of amendments. This conflict is often resolved in favor of the privilege of amending, and reversals are common where the appellant makes a reasonable showing

of prejudice from the ruling." *Mesler v. Bragg Mgmt. Co.*, 39 Cal. 3d 290, 293 (1985) (quoting 3 Witkin, Cal. Procedure, Pleading, § 1042 (2d ed. 1971)).

B. LEGAL STANDARDS FOR GRANTING LEAVE TO AMEND A COMPLAINT

Leave to amend is liberally granted regardless of the number of previous attempts. *West v. JPMorgan Chase Bank, N.A.*, 214 Cal. App. 4th 780, 806 (2013) (court liberally construed Appellant's third amended complaint); *Lockton v. O'Rourke*, 184 Cal. App. 4th 1051, 1060 (2010) (Appellant allowed to amend complaint five times); *Stevenson v. San Francisco Hous. Auth.*, 24 Cal. App. 4th 269, 284 (1994) (had amended her complaint seven times); *Stansfield v. Starkey*, 220 Cal. App. 3d 59, 76 (1990) (Appellants had been granted leave to amend their complaint five times); *Winn v. McCulloch Corp.*, 60 Cal. App. 3d 663, 672 (1976) (reversing judgment of dismissal and allowing Appellants to file a sixth amended complaint).

The liberal policy of permitting amendment at any stage of proceedings has included amendments permitted during the trial. California Code of Civil Procedure § 576 provides that "at any time before or after commencement of trial," a judge may allow the amendment of any pleading "in the furtherance of justice." *McDougald v. Hulet*, 64 P.2d 278 (Cal. 1901). It is an abuse of discretion to deny amendment "where the refusal also results in a party being deprived of the right to assert a meritorious cause of action or a meritorious defense." *Williams v. Braslow*, (1986) 179 Cal.App.3d 762, 774, (reversing summary judgment and remanding to allow Appellant to file a fifth amended complaint) *Youngman v. Nevada Irrigation Dist.* (1969) 70 Cal.2d 240, 245;

Burkle v. Burkle (2006) 141 Cal.App.4th 1029, 1042 (trial court erred in denying leave to amend complaint to add new claims after Appellant raised triable issues regarding facts supporting new claims in opposition to defendant's summary judgment motion.)

If the original pleading has not framed the issues in an articulate and precise manner, an Appellant should not be precluded from having a trial on the merits.” *Honig v. Financial Corp. of America* (1992) 6 Cal.App.4th 960, 965. More bluntly, the “right of a party to amend to correct inadvertent misstatements of facts or erroneous allegations of terms cannot be denied.” *Blakey v. Superior Court* (1984) 153 Cal.App.3d 101, 107. In deciding a motion for summary judgment where an Appellant proposes to amend the complaint, the trial court should instead “review those allegations the party proposes to add to the complaint to cure existing deficiencies, and determine whether the proposed additions would be sufficient to survive summary judgment.” *Hansra v. Superior Court*, (1992) 7 Cal.App.4th 630, 647.

While “sham pleadings omitting an incurable defect in the case,” are not proper, the “[r]ules of pleading are conveniences to promote justice and not to impede or warp it. We do not question the rule that all allegations of fact in a verified complaint, which are subsequently omitted or contradicted, are still binding on the complainant. The rule is valid and useful, but it does not exist in a vacuum and cannot be mechanically applied. It is a good rule to defeat abuses of the privilege to amend and to discourage sham and untruthful pleadings. It is not a rule, however, which is intended to prevent honest complainants from correcting erroneous allegations of generic terms which may

have legal implications but which are also loosely used by laymen or to prevent the correction of ambiguous statements of fact.” *Contreras v. Blue Cross of California* (1988) 199 Cal.App.3d 945, 949, 950. The “sham pleading rule” should not be applied in a case such as this, where the Appellant seeks to change his legal theory of recovery and the legal conclusions he seeks to draw from underlying factual events, and also seeks to omit factual allegations that are irrelevant and immaterial to the new legal theories asserted. *Amarel v. Connell*, 202 Cal. App. 3d 137, 145.

Serious prejudice to the Appellant caused by the rejection of a proposed amended complaint is paramount in determining whether a trial court abused its discretion when denying Appellant permission to amend. For example, denial of leave to amend constitutes an abuse of discretion where the new allegations in the proposed amended complaint are integral to Appellant’s theory of recovery and will not unfairly surprise the defendant. Prejudice to a defendant only arises when a defendant is “surprised” by the allegations in the proposed amended complaint. *Ranier v. Cmty. Mem’l Hosp.*, 18 Cal. App. 2d 240, 255 (1971) (Trial court abused its discretion in denying leave to amend the complaint during trial where Respondents did not claim that they were surprised by the new theory alleged.)

Examples of prejudice include where the opposing party has lost the opportunity to assert certain legal rights or undertake protective legal action that would have been available if the amendment were presented earlier; or where the opposing party demonstrates that as a result of delay important information has been irretrievably lost

because of destroyed evidence or missing witnesses. *Cota v. County of Los Angeles*, 105 Cal.App.3d 282, 288 (1980), *cert. denied*, 449 U.S. 1014 (1980). Even when the case has been set for trial then continued, delay alone will not constitute prejudice sufficient to justify denial of leave to amend. 3 *Wilkin, Cal. Procedure, Pleading*, § 1042 (2d Ed. 1971)

C. RELATION BACK OF AMENDMENTS TO A COMPLAINT

An amended complaint is considered a new action for purposes of the statute of limitations only if the claims do not “relate back” to an earlier, timely-filed complaint. Under the relation-back doctrine, an amendment relates back to the original complaint if the amendment: (1) rests on the same general set of facts; (2) involves the same injury; and (3) refers to the same instrumentality. *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 408–409; *Austin v. Massachusetts Bonding & Insurance Co.* (1961) 56 Cal.2d 596, 600. An amended complaint relates back to an earlier complaint if it is based on the same general set of facts, even if the Appellant alleges a different legal theory or new cause of action. *Kittredge Sports Co. v. Superior Court* (1989) 213 Cal.App.3d 1045, 1048; *Idding v. North Bay Construction Co.* (1995) 39 Cal.App.4th 1111, 1113.

In determining whether the amended complaint alleges facts that are sufficiently similar to those alleged in the original complaint, the critical inquiry is whether the defendant had adequate notice of the claim based on the original pleading, i.e. was not “surprised.” *Garrison v. Board of Directors* (1995) 36 Cal.App.4th 1670, 1678; *Benfield v. Mocatta Metals Corp.* (2d Cir.1994) 26 F.3d 19, 23. The test looks to fair notice to

the defendant. If there is sufficient commonality between the original and the amended complaints to avoid unfair surprise, then relation back is appropriate. *Pointe San Diego Residential Community, L.P.*, 195 Cal.App.4th 265, 276–77 (4th Dist.2011) Ultimately, in applying the relation-back doctrine, courts should prioritize the “strong policy in this state that cases should be decided on their merits.” *Idding, supra*, 39 Cal.App.4th at p. 1114.

D. REVIEW OF GRANTS OF MOTIONS FOR SUMMARY JUDGMENT

A single triable issue of fact defeats a motion for summary judgment. Respondents are entitled to summary judgment only if "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Code of Civil Procedure, § 437(c) To determine whether triable issues of fact do exist, the Court independently reviews the record. *Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 64. The Court must view the evidence in the light most favorable to Appellant as the losing party, resolving all evidentiary doubts and ambiguities in her favor. (*id.*) The Court must liberally construe evidence in the plaintiff's favor and strictly against the Respondent's to determine whether defendant has shown that Appellant has not established a *prima facie* case, "a showing that would forecast the inevitability of a nonsuit" *Saelzler v. Advanced Group 400*, 25 Cal.4th 763, 768 (2001).) Since Business and Professions Code § 14205(e)(3) states that continuous and exclusive use of a professional personal trade name for a period of five years is sufficient evidence of secondary meaning, and all ambiguity must be resolved in the

Appellant's favor, the existence of secondary meaning in the Appellant's professional name, is, as a matter of law, a triable issue of fact in the case. If the Respondents don't like it they're welcome to petition their representatives.

It is worth noting that even assuming, *arguendo*, that the Appellant has not established a single triable issue of fact in support of her trademark claims, summary judgment would still have been inappropriate. In the event of easily cognizable unpleaded claims, granting summary judgment based on mistaken legal conclusions in the complaint would still be improper. *Kirby v. Albert D. Seeno Construction Co.* (1992) 11 Cal.App.4th 1059, 1068. By granting summary judgment and denying leave to amend to add simpler claims already supported by the facts in the operative Complaint (not to mention newly discovered defendants), the trial Court wrongfully denied the Appellant her day in Court.

VI. ARGUMENT

This Court must determine whether the lower Court abused its discretion in denying Appellant's motion for leave to amend her 4AC. Because the trial court provided no reasoned decision justifying denial of Appellant's motion for leave to amend, and there was an absence of prejudice to Respondents, but serious prejudice to the Appellant, the trial Court abused its discretion and this Court must reverse.

A. IT WAS A CLEAR ABUSE OF DISCRETION FOR THE TRIAL COURT TO DENY APPELLANT LEAVE TO AMEND

There can be no clearer example of circumstances warranting a reversal of a lower Court's refusal to permit amendment of a complaint than in the case at hand. Appellant faced motions for summary judgment from both Respondents that were based on the very alleged deficiencies that Appellant sought to remedy by amendment to her Complaint. It was a foregone conclusion that Appellant would not be able to adequately oppose the Respondents' motions for summary judgment in the absence of amendments to the 4AC.

In its Order granting Respondents' motions for summary judgment, the lower Court stated that both motions "primarily argue that the "Ison Marks" do not qualify for trademark/tradename protection," (CT vol. 30, p.7610, lines 3-4, SJ Order). The Court also declared that "each of Appellant's remaining causes of action also contain language making it clear that all of them arise from and depend on Appellant's allegations that the "Ison Marks" are protected trademarks/trade names." (CT vol. 30, p. 7611, lines 17-19 SJ Order). In fact, Appellant referred to misuse of her name six times in her 4AC. Furthermore, Appellant had properly submitted a Motion for leave to amend the 4AC prior to the hearings on Respondents' motions for summary judgment and *months before the scheduled trial date*. Appellant's proposed 5AC included allegations of fact based on evidence obtained from Respondents' belated responses to ongoing discovery³.

³ At the time of the decision on Respondents' Motions for Summary Judgment, Appellant had been unable to obtain depositions of appropriate representatives of Respondents' corporations as "persons most knowledgeable," despite repeated attempts to do so. In addition, Appellant had been limited in discovery by the Court, to narrow fields of inquiry excluding information regarding the manner in which her business name and identity were promoted to third parties in both Respondents' advertising campaigns.

that clarified that certain claims were not reliant on whether Appellant possessed trademark rights, with all proposed changes arising out of the same general facts alleged in each previous iteration of her Complaint.

B. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT LEAVE TO AMEND THE 4AC

1. APPELLANT'S MOTION FOR LEAVE TO AMEND WAS NOT UNTIMELY

The trial court failed to provide sufficient reasons or reasoning supporting its holding that Appellant's Motion for Leave to File the Fifth Amended Complaint ("Motion for Leave") was untimely. (CT vol. 30, pp. 7607, lines 16-17, Order). Appellant's Motion for Leave was filed November 19, 2013⁴, with three (3) months left before the trial date of February 11, 2013. While there was a period of time between the filing of the 4AC and the Appellant's Motion for Leave, Respondents had not commenced providing substantive responses to discovery until June of 2013. In fact, discovery was ongoing even at the time of the hearings on Appellant's Motion for Leave and Respondents' Motions for Summary Judgment. In addition, Appellant had just retained Ms. SaraLynn Mandel, a registered patent attorney in Southern California with expertise in patents, trademarks, copyrights, and e-commerce, to represent her in August of 2013.

⁴ Appellant also filed a Notice of Errata on November 20, 2013, with some corrections. (CT vol. 23, p.5702)

As was stated earlier, Appellant's counsel commenced representation in the midst of active discovery with multiple deadlines and demands from both corporate Respondents represented by teams of attorneys. She also had to review voluminous files while trying to accommodate the existing deadlines. (CT vol.21, pp.5188-5189, Mandel Decl. in support of Pl's Mot for Lv). Appellant's new counsel recognized that Appellant's cause of action in the 4AC required clarification, and that the alleged facts supported new causes of action, but it took her time to review the evidence and formulate revisions to the 4AC. Had Respondents cooperated with the spirit and substance of discovery responses, as mandated by the discovery rules of this State, Appellant could have brought her motion for leave substantially earlier.

Respondents' assertions in their Oppositions to Appellant's Motion for Leave to File a Fifth Amended Complaint that Appellant's alleged delay in seeking leave to file a 5AC was in "bad faith" or "without explanation," are devoid of merit and are insufficient to justify denial of Appellant's proposed amendments to her complaint. (CT vol.26, p. 6688, lines 13-24, Google Opp; and vol.27, p.6707, Yahoo! Opp.) If Defendant Yahoo! was attempting to suggest that the proposed 5AC was a "sham pleading," the record is devoid of any facts suggesting Appellant was untruthful, or acted in bad faith, as a "layperson" attempting to assert causes of action based on the facts alleged." *Berman v. Bromberg*, 65 Cal. Rptr. 2d 773, 781-84 (1997). Not only was there no delay by the Appellant in seeking leave to amend once she began receiving discovery from Respondents and retained new counsel, leave to amend a complaint can

be sought *even during trial*, and regardless of the number of times the complaint has been previously amended. *West v. JPMorgan Chase Bank*, 214 Cal. App. 4th 780, 806; CCP §576. Moreover, Respondents had been on notice since at least September 2012, less than one month after Appellant retained new counsel, that amendment of the 4AC would be sought. (CT ; p.7327, lines 14-16, vol. 29, Mandel Decl.) Respondents did not and could not assert “surprise” in opposition to Appellant’s motion for leave to amend. *Ranier v. Cmty. Mem’l Hosp.*, 18 Cal.App. 2d 240, 255 (1971).

The period of time between Respondents finally producing documents and Appellant’s filing of her Motion for Leave in November, 2013, a period of at most four (4) months, is not a significant “delay” justifying denial of the Motion for Leave, particularly in view of the lack of surprise or other prejudice to Respondents, and the prejudice caused to Appellant.

2. WHILE APPELLANT HAS BEEN SEVERELY PREJUDICED BY THE DENIAL OF LEAVE TO AMEND, ANY PREJUDICE TO RESPONDENTS WAS NEGLIGIBLE

a. Neither Defendant Was “Surprised” nor Otherwise Demonstrated Serious Prejudice

Courts in California have permitted amendment of complaints, *even during trial*, where the prejudice caused to an Appellant outweighs prejudice that may be caused to a Defendant from any delays, including from subsequent demurrers. The types of prejudice to a Defendant that might rise to a level justifying denial of leave to amend include where the Defendant is surprised by proposed claims, or loses an opportunity to

assert a legal right or take legal action to protect itself, or evidence “is irretrievably lost” because the amendment sought was not presented earlier. *Ranier v. Cmty. Mem’l Hosp.*, 18 Cal. App. 2d 240, 255 (1971); *Cota v. County of Los Angeles*, 105 Cal.App.3d 282, 288 (1980).

Both Respondents opposed Appellant’s motion for leave and argued prejudice, but neither Defendant asserted surprise. (CT vol.26, pp.6683-6702; 6703-6721, Google’s Opp. Pl. Mot. Leave; Yahoo’s Opp. Pl. Mot. Leave). Indeed, it is clear from both Respondents’ oppositions that they were well aware that Appellant was going to request leave to amend her complaint. For example, Defendant Google argued in its Declaration in Opposition to Appellant’s Motion for Leave that it would be prejudiced by a delay in trial and need to conduct discovery and file a demurrer because it would have to “reengineer its trial strategy.” (Google Opp.Mot.Leave, *supra*, p. 1, 21-24). However, Google also argued that Appellant had allegedly “anticipated seeking leave to add new claims since June 2010.” (CT vol.26, p.6688, Google Opp., lines 14-15).

Similarly, Defendant Yahoo! did not assert that it was taken by surprise by any of Appellant’s revised and new claims for relief in the proposed 5AC, asserting that Appellant had allegedly informed it of an intent to add new claims between “June 2, 2010 and August 1, 2012.” (CT vol.26, p.6716, Yahoo! Opp., lines 17-18).

b. Any Alleged Delay or Inconvenience was not Prejudicial to Respondents

Respondents’ asserted in their Oppositions that Appellant unreasonably delayed seeking to amend the 4AC, causing prejudice to the Respondents. However, not only

were Appellant's alleged assertions of an intent to amend made before Appellant had retained intellectual property counsel, it is undisputed by either Defendant that responses to discovery did not commence until after June 15, 2012. (CT vol.26, p.6691, Google Opp., lines 4-5). Appellant did not have the information available to assess her causes of action further, until after she was able to review discovery and have her new counsel do so starting in August of 2012. The *only* conclusion that flows from Respondents' arguments in their Opposition is that both Respondents could not have been surprised when Appellant moved for leave to file the 5AC.

Moreover, neither Defendant asserted that witnesses or evidence were lost or otherwise unavailable, or that they would not be able to undertake any needed legal protective action. *Cota v. County of Los Angeles, supra*. Rather, Yahoo! asserted that the "allegations and claims" against it in the 5AC were "not made in good faith." (CT. vol. 26, p.6711, Yahoo's Opposition to Appellant's Motion for Leave to File Fifth Amended Complaint, p. 5, lines 7-13.) In addition to the absence of precedent supporting "lack of good faith" as a reason to deny amendment, Yahoo! then provided factual allegations from Appellant's proposed 5AC, that Yahoo! disputes, in support of Appellant's alleged "bad faith." Yahoo's contentions regarding alleged bad faith are not a proper basis for denial of leave to file an amended complaint. Even if there were such a basis, the fact that Appellant alleges facts that Yahoo! disputes does not establish bad faith- it demonstrates that the parties don't agree on the facts.

Yahoo! also argued in its Opposition, that it would be "severely prejudiced" because the motion was filed on the "eve of trial." (CT vol.26, Yahoo! Opp. P. 12, lines 6 to 8). As set forth above, motions for leave to amend even during trial are considered timely and as such the timing does not in itself establish prejudice. Cal.Code Civ. Proc. § 576. The "severe" prejudice advanced by Yahoo! was that because the proposed 5AC had a new cause of action, it would require further discovery and entail increased cost and a need to "revise its trial strategy." (CT vol.26, p.6718, Yahoo! Opp., lines 9-16). Proposed addition by an Appellant of new causes of action or even new theories of liability to a complaint is not a proper basis for denying leave to amend a complaint where the opposing party is not surprised. *Idding v. North Bay Construction Co.* (1995) 39 Cal.App.4th at 1113.

The *possibility* that a set trial date will be postponed, or that a defendant will be inconvenienced by having to demur or perform additional discovery- the main argument advanced by both Respondents in their Opposition to Appellants Motion for Leave- is not sufficient reason to deny a Appellant the right to amend a complaint. Yet, the lower Court's denial was based on these two possibilities; that the trial date might need to be continued, and that Respondents would be inconvenienced, because, essentially, the litigation would continue. (CT vol.30, p. 7607, Order, lines 17, 21-24).

The need for an opposing party to spend more time and funds litigating is not sufficient prejudice, and certainly not the type of "severe prejudice" that would merit the denial of amendment of the 4AC to permit Appellant to defend against both

Respondents' motions for summary judgment. The Courts in California hold directly to the contrary, particularly where the defendant has no basis for asserting that it was "surprised" by the proposed amendments to the complaint. *Berman v. Bromberg*, 56 Cal.App.4th 936, 939.

c. Appellant was Severely Prejudiced from Denial of Leave to File a 5AC

In contrast, the prejudice to Appellant, readily foreseeable at the time the lower Court denied the Motion for Leave, in view of Respondents' pending motions for summary judgment, and which subsequently occurred, was substantial and irreparable. Appellant was unable to adequately defend against Respondents' motions for summary judgment, because the 4AC did not clearly state her causes of action independent of trademark rights, and did not include claims for additional legal theories based on the previously alleged facts. The trial court also had the proposed amendments to the 4AC before it, providing clearly stated causes of action not dependent on whether Appellant had trademark rights, as well as alleged facts supporting elements of each cause of action.

Respondents ultimately obtained summary judgment on all of Appellant's claims in her 4AC, based on their argument that all of Appellant's claims in that 4AC relied on whether her professional name had acquired secondary meaning. Had Appellant been granted her motion to amend the 4AC, Respondents would in all likelihood not have prevailed on their motions for summary judgment, and Appellant would have had her day in court on at least some of her claims as proposed in the 5AC. What is also

apparent from Respondents' oppositions, is that the Respondents assertions of prejudice were based on concerns that if Appellant was permitted to amend the 4AC to clarify "legal theories," other than trademark violations by the Respondents, she might prevail, not only in opposition to any subsequent motions for summary judgment by Respondents, but possibly at trial.

Requiring Respondents to defend against claims of an Appellant that were evident from the beginning in the alleged facts, but not clearly stated, is not prejudice: it is justice. Allowing the lower Court's rush to inevitable summary judgment to stand would be a miscarriage of justice.

d. The Proposed 5AC Was Based On The Same General Set Of Facts As The Prior Complaints And Related Back So As To Prevent A Bar To Any Claims From Statutes Of Limitations

In its Order denying Appellant's Motion for Leave, the trial court stated that "there is no legally supportable basis for the new causes of action. The statutes of limitation appear to have run. As Appellant's counsel acknowledged, there is no federal or state statute that Appellant can cite to support her new causes of action⁵." (CT vol.30, p. 7607, Order, lines 25-28).

⁵ Appellant and her counsel deny that Appellant or her counsel made any such representation to the Court or otherwise, of an alleged lack of statutory authority for the claims in the 4AC or the proposed 5AC. Nor is statutory authority for claims required, as common law may support claims, and was also alleged in the 4AC and 5AC. The Court is directed to the claims in the proposed 5AC which specifically recite statutory authority for the claims. (CT vol. 21,5208 et seq. Seventh Claim for relief (Cal.Civ.Code §1710); Sixth Claim (Cal.Bus.Prof.Code §17200); Fifth Claim, Cal.Civ.Code (§3344).)

If proposed amendments to a complaint “relate back to the same general set of facts” as in the original complaint (and previous amendments), they are not barred by statutes of limitation that may have run by the time of amendment. *Austin v. Massachusetts Bonding & Insurance Co.* (1961) 56 Cal.2d 596, 600. This is true, even if the Appellant alleges a different legal theory or new cause of action. *Kittredge Sports Co. v. Superior Court* (1989) 213 Cal.App.3d at 1048.

Not only did the trial court not support its conclusion in its denial of Appellant’s motion for leave, that the statutes of limitation had run (i.e. no relation back), but neither Defendant provided examples of proposed amendments that did not relate back to the general facts previously alleged by Appellant.

Defendant Google asserted in its Opposition to the Motion for Leave that the amended claims raised “new issues.” Additionally, Google asserted that the amendments placed “new rights” in issue, “other than Dr. Ison’s purported trademark rights.” (CT vol.26, p.6700, Google Opp. Mot. Leave, line 16; p.6701, lines 10-11). “New issues” do not constitute “new facts,” so as to prevent relation back of amendments. “New rights,” i.e. new claims and/or new legal theories are exactly what our Courts have contemplated in their decisions preserving a Appellant’s rights to correct insufficiencies in complaints and prevent serious prejudice. *Williams v. Braslow*, (1986) 179 Cal.App.3d at 774; *Sanai v. Saltz* (2009) 170 Cal.App.4th at 768; *Burkle v. Burkle* (2006) 141 Cal.App.4th at 1042; *Honig v. Financial Corp. of America* (1992) 6 Cal.App.4th at 965; and *Blakey v. Superior Court* (1984) 153 Cal.App.3d at 107.

Defendant Yahoo! did not directly address any alleged failure of the proposed 5AC to relate back, in its Opposition to Appellant's motion for leave, but asserted that "[A]ll of the new proposed claims are based on wholly different sets of alleged rights and obligations," and that the proposed fourth and fifth causes of action were "based on the alleged commercial value of the Appellant's personal identity as an individual, which is wholly distinct from trademark rights..." (CT vol.26, p.6718, Yahoo! Opp.Mot.Leave 5AC, lines 23-26).

The trial court had before it Appellant's proposed 5AC, as well as a document detailing the changes between the 5AC and the 4AC, demonstrating that the 5AC was based on the same general set of facts as set forth in the original complaint through the 4AC. (CT vol.21, 5259 *et seq.*, Comparison of 5AC with 4AC). Moreover, the lower Court could not have failed to observe *that the proposed 5AC was not limited to alleged trademark rights of Appellant*, but included allegations that her business name and identity were misused by both Respondents under California common and statutory laws, and would therefore provide Appellant with additional defenses against the Respondents' motions for summary judgment. The lower Court did not support its denial of the Motion for Leave with any finding that Appellant's allegations in the proposed 5AC would not create additional genuine issues of material fact that would render summary judgment a clear error. (CT vol.30, p.7607, Order).

Examples of the relation back of the proposed amendments in the 5AC include: the fourth claim for relief in the proposed 5AC for commercial misappropriation under

California common law; corrected deficiencies in the previous sixth claim of the 4AC, alleging that Appellant had the “sole right to profit from the commercial value of her identity and to protect the economic value of her name,” and that Respondents appropriated her “identity and name to commercial advantage” without her consent “to promote third party advertising of unrelated products and services on the Internet;” and alleged additional facts meeting elements of the claim (CT vol.21, p.5246, proposed 5AC, ¶¶150-155).

The proposed fifth claim for relief for statutory misappropriation relied on previously alleged facts of the misuse by Respondents of Appellant’s identity and name for profit (CT vol.21, pp.5246-5247, proposed 5AC, ¶¶158-160). The sixth claim for relief in the proposed 5AC (previously the seventh claim in 4AC) for unfair trade practices under Cal.Bus.Prof.Code §17200 also alleged misuse of Appellant’s name (¶168). Similarly, the seventh claim for relief in the proposed 5AC for fraudulent and deceitful concealment under Cal.Civ.Code §1710 alleged facts that had been previously alleged regarding intentional concealment by Respondents from Appellant of the risks of using her name in Respondents’ advertising and website hosting programs, as well as other supporting elements required under the statute. (¶¶176, 177,182). The alleged facts in the new eighth and ninth claims for relief in the proposed 5AC, for negligence or recklessness, and negligent interference with prospective economic relations, were facts alleged in the previous complaints, or facts obtained during discovery that arose out of the same general set of facts previously alleged.

Denial of leave to amend by the trial Court constituted clear abuse of discretion.

C. THE COURT ERRED IN GRANTING RESPONDENTS' MOTIONS FOR SUMMARY JUDGMENT

Whether a descriptive term or mark has acquired a secondary meaning is a question of fact. *Levi Strauss & Co. v. Blue Bell, Inc.* (9th Cir. 1985) 778 F.2d 1352, 1355.

Although a personal name used in commerce must acquire secondary meaning to receive trademark protection, five years of continuous and exclusive use in commerce constitutes *prima facie* evidence of common law secondary meaning under both California and Federal law. Business and Professions Code § 14205(e)(3) "The secretary may accept as evidence that the mark has become distinctive, as used on or in connection with the applicant's goods or services, proof of continuous use thereof as a mark by the applicant in this state for the five years before the date on which the claim of distinctiveness is made." Although there appears to be no case law directly addressing this subsection, academic analysis agrees with this reading. *19 J. Contemp. Legal Issues* 41 Part One: The Common Law, the States, and Historical Perspective: Requirements for Mark Registration and Renewal under California's New Trademark Law, Borzcik (2008) " n13. 3 *Restatement of Unfair Competition* §§13-14, listing various types of designations that cannot function as marks unless they have acquired "secondary meaning" in the minds of prospective purchasers. See MSTL § 14205(e), which codifies the common-law doctrine but then allows "proof of continuous use ... as a mark by the applicant in this state for the five years before the date on which the claim of distinctiveness is made" to satisfy the "secondary meaning" element for purposes of

registration.” Registration with the state under California Business and Professions Code §14205(e)(3) was not necessary; registration would merely have extended her common law trade name rights statewide. To interpret §14205(e)(3) any other way would render the language of the statute superfluous verbiage; after all, the secretary already has a right to consider evidence of various types in support of trademark claims.

Federal law, which parallels California trademark law, also concurs. “Guidelines appearing in Patent and Trademark Office, Trademark Manual of Examining Procedure § 1212.05 indicate that under § 2(f) of the Lanham Act proof of substantially exclusive and continuous use for five years will generally suffice to establish secondary meaning for surnames and marks that are not highly descriptive; it is not sufficient for highly descriptive terms, container shapes, or ornamentation.” *3Restatement of Unfair Competition, § 13*. Since admissible evidence demonstrates that the Appellant started her practice in 2004, her personal professional name acquired secondary meaning no later than 2009. (CT 4178, vol. 17, Ison Decl. line 20)

Although the “five years of continuous and exclusive use” rule seems likely to have been a bright line to simplify the work of government bureaucrats, six years of continuous and exclusive use has elsewhere been treated as evidence of secondary meaning, which would grant the Appellant trademark rights no later than 2010. *Trak Inc. v. Benner Ski KG*, 475 F.Supp. 1076 (D.Mass.1979)). Use and seniority were considered the most important evidence of secondary meaning under the common law. Judge Learned Hand said in relation to trademarks that “. . . it is the priority of user

alone that controls, even though when the defendant comes into the field, it may not be fully established or even be enough established to become largely associated in the public mind with the Appellant's mark. Were it not so, it would be of extreme difficulty to show at just what point in time the mark became associated with the maker in enough of his customer's minds to justify the inference that the defendant's use might have become confusing. Therefore, once his use begins, the rest of the public must avoid his fanciful mark." *Waldes v. International Manufacturers' Agency, Inc.*, 237 F. 502, 505 (1916)) No particular level of public awareness was needed. Secondary meaning does not require "all the people, nor most of the people, nor very many of the people of a place, but so many of them as contradistinguishes them from a few." *Mary Pickford Co. v. Bayly Bros., Inc.*, 12 Cal.2d 501, 514 (1939)

Other examples of names that acquired secondary meaning without being used for particularly long included a play produced only in New York that acquired secondary meaning throughout the United States. *Aronson v. Fleckenstein*, 28 F. 75; *Hemingway v. Film Alliance of United States, Inc.*, 174 Misc. 725 [21 N.Y.S.2d 827]; *Frohman v. Payton*, 34 Misc. 275 [68 N.Y.S. 849]., and a play that had only been produced for a few weeks in Paris, France *Frohman v. Wm. Morris*, 68 Misc. 461 [123 N.Y.S. 1090]. *The Restatement of the Law of Torts, 3d*, (§ 716b.), puts it simply: "No particular period of use is required." Nor does the number of people aware determine secondary meaning. *Jackson v. Universal International Pictures, Inc.*, 36 Cal. 2d 116, 122 (The precise size of this segment of the public is important in connection with the

amount of damages which should be awarded, but it does not determine whether the title has acquired a secondary meaning, when only about 3,750 persons attended performances of play.)

Regardless of where the burden of proof belonged, the trial Court still erred in granting summary judgment to the Respondents by ignoring ample evidence in support of secondary meaning already in the record. For example, courts across the country have treated imitation and copying as evidence in support of secondary meaning. *Harlequin Enterprises Ltd. v. Gulf & Western Corp.*, 644 F.2d 946 (2d Cir.1981); *RJR Foods, Inc. v. White Rock Corp.*, 603 F.2d 1058 (2d Cir.1979). Some courts have held that deliberate copying creates a *prima facie* case of secondary meaning. *M. Kramer Manufacturing Co. v. Andrews*, 783 F.2d 421 (4th Cir.1986); *Audio Fidelity, Inc. v. High Fidelity Recordings, Inc.*, 283 F.2d 551 (9th Cir.1960); *Perini Corp. v. Perini Construction, Inc.*, 915 F.2d 121 (4th Cir.1990); *Processed Plastic Co. v. Warner Communications, Inc.*, 675 F.2d 852, 857 (7th Cir. 1982) (intentional copying establishes presumption of intent "to create a confusing similarity of appearance and to have succeeded at doing so.")

Intentional attempts to take advantage of another's business goodwill have been treated as evidence of both secondary meaning and unfair competition. Trade dress should be "protected against intentional, deliberate attempts to capitalize on a distinctive product" where "secondary meaning is 'in the making' but not yet fully developed." *Metro Kane Imports, Ltd. v. Federated Dept. Stores, Inc.*, 625 F. Supp. 313, 316

(S.D.N.Y. 1985), *aff'd*, 800 F.2d 1128 (2d Cir. 1986); *Laureyssens v. Idea Group, Inc.*, 964 F.2d 131 (2d Cir.1992) (intentional copying supports an inference of secondary meaning if the circumstances show an intent to benefit from the prior user's good will, citing *Restatement Third, Unfair Competition § 16, Comment b* (Tent. Draft No.2 (1990))); "The essence of the law of unfair competition is fair play- fair play to the consumer and to one's competitor. Competition may be vigorous, but not deceptive. Our own Court of Appeals recently gave strong support to the enforcement of 'increasingly higher standards of fairness of commercial morality in trade,' when it ruled that intent to trade on another's reputation and name brings its own condemnation, even absent proof of secondary meaning" *Atlantic Monthly Co. v. Frederick Ungar Publishing Co.* 197 F. Supp. 524, 534. Academic analysis is on board with this idea." [E]vidence that the trade dress or product design was intentionally copied by a competitor can support an inference of secondary meaning if the circumstances indicate an intent to benefit from the good will of the prior user through confusion." *Restatement of the Law, 3d, Unfair Competition*, § 16 comment b at 106, The American Law Institute (1995).

Furthermore, secondary meaning can develop quickly to preclude knock-off artists from infringing *Maternally Yours, Inc. v. Your Maternity Shop, Inc.*, 234 F.2d 538, 541 (2d Cir. 1956) (secondary meaning acquired in mark MATERNALLY YOURS for maternity apparel store in the 11 months preceding defendant's opening of store named YOUR MATERNITY SHOP.) Courts in the interest of justice have even protected trade dress without secondary meaning *Saratoga Vichy Spring Co. v. Lehman*,

625 F.2d 1037, 1044 (2d Cir. 1980). These practices include palming off, actual deception, appropriation of another's property, *Norwich Pharmacal*, 271 F.2d 569, 570-71; *Upjohn Co. v. Schwartz*, 246 F.2d 254, 261-62 (2d Cir. 1957), or deliberate copying. *Morex S.P.A. v. Design Inst. of Am., Inc.*, 779 F.2d 799, 801-02 (2d Cir. 1985); *Perfect Fit Indus.*, 618 F.2d 950, 952-54; *Cytanovich Reading Center v. Reading Game* (1984) 162 Cal. App. 3d 107, 113 (subsequent imitation of that name or design by another, with the effect of confusing or deceiving buyers as to the origin of goods or services, may be enjoined as unfair competition, even though the original name is unprotected by trademark, copyright, or patent, *dicta*). Nor is actual confusion necessary *Winfield v. Charles*, 77 Cal.App.2d 64, 70.

This is a particular problem for professionals such as the Appellant who often face ethical restrictions on the use of "fanciful" names and frequently rely on secondary meaning to protect their reputations. The Appellant must abide by her rules of professional responsibility. Business and Professions Code § 17500, 16 Code of California Regulations § 1396.2 (A psychologist shall not misrepresent nor permit the misrepresentation of his or her professional qualifications, affiliations, or purposes, or those of the institutions, organizations, products and/or services with which he or she is associated.) The special ethical requirements of her profession impose an affirmative duty on the Appellant to defend her professional personal name aggressively. Had the Appellant filed a fictitious business name she would have had a rebuttable presumption of the secondary meaning in her professional business name in her geographical area

("Filing a fictitious business name statement, when required pursuant to Bus. & Prof. Code § 17910, creates a rebuttable presumption that the registrant has the exclusive right to use as a trade name, in the county of filing, that fictitious business name and any other confusingly similar trade name" California Business and Professions Code § 14411.) However, individual proprietors are not required to register, for the obvious reason that consumer confusion is not an issue (or should not be). *Kohler v. Stephenson*, 39 Cal App 374, 178 (1919).

The Appellant has put forth other evidence in support of her trademark claims.

Uniqueness, which the Appellant has also claimed and appears to be beyond dispute is also evidence in support. "A mark may be strengthened by extensive advertising, length of time in business, public recognition, and uniqueness." *Century 21 Real Estate Corp. v. Sandlin* (9th Cir. 1988) 846 F.2d 1175, 1179.

Exclusivity, which the Appellant has also demonstrated, also constitutes evidence in support. *Ford Motor Co. v. Summit Motor Products, Inc.*, 930 F.2d 277 (3d Cir.) (1991) (extent of sales and advertising, length of use, exclusivity of use, copying by another, customer surveys, customer testimony, use in trade journals, size of the company, number of sales, number of customers, and actual confusion). Both of these characterize the Appellant's marks.

The judgments in favor of the Respondents should, for the reasons above, be reversed.

D. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE APPELLANT'S RIGHTS TO BASIC DISCOVERY THROUGH INTERROGATORIES AND PROPER PMK DEPOSITIONS

Parties "may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in a pending action. Cal. Civ. Proc. §2017.010. The standard of review in regard to a court's denial of discovery is abuse of discretion. *Fisher v. Superior Court* (1986) 177 Cal. App. 3d 779, 784.

The trial Court abused its discretion by not allowing the Appellant the chance to fully develop her case through interrogatories and requests for production of documents or her requests for "PMK" depositions with qualified deponents, which the Respondents unmeritoriously objected to or refused to adequately provide. (CT vol. 14, pp. 3562-3563, Order Re: Mot to Compel; vol. 20, pp. 5166-5170, Order Re: Pl's Depo Ntc to Yahoo!; vol. 28, pp. 7053-7056, Order on Google PMK). Unmeritorious objections are considered discovery abuse pursuant to Cal.Civ.Proc §2023.010. *Liberty Mutual Fire Ins. Co. v. LcL Adm'rs*, (2008) 163 Cal.App.4th 1093, 1106. In addition, the discovery Court's denied Appellant her right to question Yahoo! in relation to the website hosting contract that she had with Yahoo! (CT vol. 14, pp.3562-3563, Order Re: Mot to Compel.)

Courts are allowed to limit the scope of discovery if they determine that the burden, expense or intrusiveness of it clearly outweighs the likelihood of obtaining admissible evidence. (Cal. Civ. Proc. §2017.020.) In this case, the problems that led to this lawsuit relate to many aspects of each of Respondents' individual systems because each of those systems is highly integrated. Broad questioning of the Respondents in regard to their systems is therefore necessary. It is not Appellant's problem that Respondents created their systems in the way they

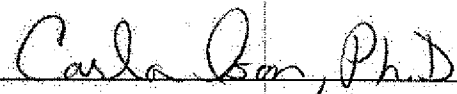
did, or that their actions led to an extensive amount of evidence. The Respondents need to be held to account.

Because of the discovery abuses by Respondents and abuse of discretion by the Court, Appellant respectfully requests reversal of all discovery rulings and a reopening of discovery.

VII. CONCLUSION

It cannot be any more apparent that by denying Appellant the ability to correct the 4AC to state causes of action not restricted to whether she had trademark rights in her name, the trial court laid the foundation for granting Respondents' motions for summary judgment. This Court should soundly reject the type of gamesmanship evidenced by both Respondents and implicitly endorsed by the trial Court by reversing both the denial of Appellant's Motion for Leave to File a Fifth Amended Complaint and the grant of Respondents' Motions for Summary Judgment. The Court should also remand with instructions to grant Appellant's Motion for Leave to file her 5AC, and to reopen discovery so the Appellant can fairly litigate her case.

Dated: January 6, 2014

A handwritten signature in cursive script, reading "Carla Ison, Ph.D.", written over a horizontal line.

Carla Ison, Ph.D.
Plaintiff—*In Propria Persona*


CERTIFICATE OF COMPLIANCE

(Cal. Rules of Court, Rule 8.204(c))

This brief consists of 13,717 words as counted by the Microsoft
Word version 2010 word processing program used to generate the brief.

Executed at: Mountain View, California.

Dated: January 6, 2014



Carla Ison, Ph.D.
Plaintiff—*In Propria Persona*

PROOF OF SERVICE

I am employed in the County of Santa Clara, State of California. I am over the age of eighteen years. I am a party to the within action; however, by Order of the California Superior Court in the County of Santa Clara, I am authorized to serve parties in this lawsuit via electronic mail. My business address is 100 W. El Camino Real, Suite 74B, Mountain View, CA 94041.

On January 6, 2014, I served true copies of the following document(s) described as:

Plaintiff-Appellant's Opening Brief Proof of Service

The above documents were served on the following parties in this action:

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BY ELECTRONIC SERVICE: I am readily familiar with the practices of processing correspondence via electronic mail. Under that practice, I attached the above documents to an electronic mail message and sent them to the electronic mail addresses of the parties listed above.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 6, 2014.


Carla Ison, Ph.D.—Plaintiff—*In Propria Persona*